SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0103

ANNA LEIMONITIS — Applicant

v

THE QUEEN — Respondent

JUDGES:	PRIEST and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	8 August 2018
DATE OF JUDGMENT:	8 August 2018
MEDIUM NEUTRAL CITATION:	[2018] VSCA 198
JUDGMENT APPEALED FROM:	*DPP v Leimonitis* (Unreported, County Court of Victoria, Judge Higham, 27 April 2018)

CRIMINAL LAW — Sentence — Appeal — Obtaining financial advantage by deception — 'Rolled up' charge involving 25 transactions — Bogus insurance claims — Payment on bogus claims exceeded $200,000 — Applicant pleaded guilty — Sentenced to one year and nine months' imprisonment with non-parole period of 12 months — Whether manifestly excessive — Relatively youthful offender suffering depression and anxiety — General deterrence, denunciation and punishment relevant — Leave to appeal refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr P Chadwick QC with Mr R Edney	Powerhouse Law Australia
For the Crown	Mr M D Phillips	Mr John Cain, Solicitor for Public Prosecutions

PRIEST JA:

Introduction

1 On 15 December 2017, the applicant, now aged 27 years,[1] pleaded guilty in the County Court to a single 'rolled up' charge of obtaining a financial advantage by deception.[2]

2 Following a plea, on 27 April 2018 the judge sentenced the applicant to be imprisoned for one year and nine months, and fixed a non-parole period of 12 months.[3]

3 The applicant seeks leave to appeal against her sentence on a single ground which asserts that the sentence is manifestly excessive. A number of 'particulars' are relied upon:

(a) Plea of guilty at the earliest possible opportunity;
(b) Genuine remorse;
(c) Full and frank admissions to her employer and the police;
(d) Delay between investigation and resolution;
(e) Payment of some restitution;
(f) No prior convictions;
(g) Positive character references;
(h) No subsequent or pending matters;
(i) Youthful offender;
(j) Substantial and enduring impact of the applicant's 'abandonment' by her parents at a young age;
(k) Socially isolated;
(l) Finding by a psychologist that the applicant was 'suffering from undiagnosed depression and debilitating anxiety during the period of the offending';
(m) Voluntary engagement in counselling;
(n) Working two jobs at the time of sentence to support herself and pay restitution;

1 Her date of birth is 15 July 1991.

2 *Crimes Act 1958*, s 82(1). The maximum penalty is 10 years' imprisonment.

3 Pursuant to s 6AAA of the *Sentencing Act 1991*, the judge declared that, but for the plea of guilty, he would have sentenced the applicant to be imprisoned for two years and six months, with a non-parole period of two years.

(o) Suffering from an ongoing depressive disorder;

(p) Very low risk of re-offending;

(q) Positive finding that the applicant had 'excellent' prospects of rehabilitation;

(r) First term of imprisonment;

(s) Prison likely to weigh more heavily on the applicant because of her background.

4 In my opinion, the sentence imposed in the County Court is within the range of those open in the proper exercise of the sentencing discretion. Leave to appeal must thus be refused.

Circumstances of the offending

5 During the period of the offending — between 2 April 2013 and 5 September 2016 — the applicant was employed as a client manager in the claims department of Suncorp Insurance Corporation.

6 Although the applicant faced a single charge, her offending involved a series of 25 separate fraudulent transactions. The applicant generated false claims and corresponding false payments. She did so by creating fictitious claims which she would then approve and receive 'payment'. Generally, the payments were then deposited into the personal bank account of the applicant.[4] The total sum embraced by the applicant's peculation was $200,099.

7 A random review of the claims processed by the applicant was conducted in September 2016, raising concerns as to the legitimacy of some of them. Thereafter, a senior investigator was appointed and irregularities were detected. The applicant was interviewed and made full admissions to creating false claims and then receiving payments. Not surprisingly, her employment was immediately terminated.

[4] One transaction involved the relevant funds being passed through a bank account of a friend of the applicant before being conveyed into the personal bank account of the applicant.

8 At the request of investigating police, the applicant travelled from Sydney (where she was then living) to Melbourne in December 2016. In the course of a record of interview, the applicant made full admissions to police and expressed remorse. She told police that account names and details were made up, and that invoices that she created were based on previous invoices relating to legitimate claims that she had been involved with in the course of her employment. The applicant was unable, however, to provide an explanation as to why she had created the accounts to obtain the funds, or what she had done with the funds. Following the interview, the applicant was charged and released on bail.

9 The matter resolved at a committal mention on 16 August 2017, when the applicant entered a plea of guilty to individual charges which later were rolled-up into the single charge on the indictment. During the plea hearing, the prosecution conceded that the plea was entered 'at the earliest available opportunity'.

The plea hearing

10 On the plea, the applicant's counsel initially sought a deferral of sentencing, so as to permit the applicant's rehabilitation to continue.[5] Alternatively, a combination of a community correction order ('CCO') and imprisonment was sought.[6]

11 Counsel for the applicant relied on the fact that she had no prior convictions and nothing pending. She was in full time employment with a recruitment company in Sydney. In September 2009, just before the applicant turned 18 years, her parents 'abandoned' her and moved to Malaysia. The applicant became depressed and commenced binge eating.

12 At the time of her offending, her counsel submitted, the applicant could be considered to be youthful. Her offending was relatively unsophisticated, in that money was paid directly into her own bank account and claims were sent from her

5 See *Sentencing Act 1991*, s 83A.

6 *Sentencing Act 1991*, s 44(1).

email account. The offending occurred when the applicant was suffering undiagnosed severe depression and anxiety connected with her parents' abandonment of her. The applicant led an 'isolated' life during the offending period, locking herself in her room when not working, rarely socialising and failing to confide in family and friends.

13 It was submitted that the applicant in 2012 had the breakdown of a three year relationship, partly due to her reclusiveness following her parents' departure and partly because her partner had to migrate overseas. The applicant lost a number of friendships because of her reclusiveness but she refused to seek help. It was submitted that her depression and anxiety were not diagnosed at the time, but she had been receiving psychological treatment, so that her risk of offending was reduced. The applicant had reconciled her anger and disillusionment towards her parents and had forgiven them, leading to an improvement in her mental health, and making future offending unlikely.

14 Counsel tendered a letter of apology from the applicant to Suncorp and its staff — in which the applicant expressed her embarrassment, remorse and regret for her actions — and several character references, including from her brother, sister, family friend and former boyfriend.

15 The applicant's counsel also tendered a psychological report from the applicant's treating psychologist, Ross Leonard, who had 12 therapy sessions with her between 20 October 2016 and 12 December 2017, to manage the applicant's anxiety and depression.

16 Having heard submissions on the plea, the judge resolved to obtain a report from Forensicare. In the result, Dr Simon Vincenzi, clinical and forensic psychologist, provided a psychological report, dated 16 March 2018, in which he expressed the opinion that the applicant met the criteria for a diagnosis of major depressive disorder with comorbid anxiety. Dr Vincenzi stated that the applicant 'continues to experience some difficulty with insight and was unable to satisfactorily articulate

what motivated her behaviour'. Although the applicant realised that her behaviour was wrong, she 'felt compelled to continue'; and while the applicant 'described the offending as distressing, even while she was engaging in it, she also reported that it provided her with a sense of control in her life, which felt otherwise void of personal agency'. Dr Vincenzi said that the applicant 'could not tolerate feeling as though she was a burden on people, as she had felt frequently after her mother left'. The applicant told him that she spent the stolen money on 'things that made life easier for her and allowed her and her brothers to be self-reliant'; and she also reported that she would spend the money on 'pampering herself, such as facials or hair stylist appointments, stating, "it was like I wanted someone to love me, so I had to love myself"'.

17 Dr Vincenzi also said that the applicant 'expressed what appeared to be sincere regret regarding her offending behaviour', and 'was tearful while discussing the offending and expressed disappointment in herself about hurting people who trusted her throughout the offending period'. Importantly, he observed:[7]

> It seems likely that [the applicant's] depression, and the thoughts of helplessness associated with it, partly contributed toward her offending behaviour. The offending could be viewed as a dysfunctional coping strategy. The sense of control, the relief from financial stress, and the sense of care she received through the offending helped temporarily alleviate some of the symptoms. *There is no available evidence, however, that her depression compromised her ability to reason and, indeed, she reported being aware of the immorality of her behaviour at the time. Additionally, it seems unlikely that her depression would mean that a term of imprisonment would weigh more heavily on her than it would on a person of normal health.* It is noted, however, that given her lack of criminal history, criminal friends, and criminal associates, it seems likely that incarceration would weigh more heavily on her when compared to other inmates. She has no apparent history of antisocial or even oppositional behaviour and experiences significant anxiety when faced with interpersonal conflict. She would likely view prison as a highly foreign and distressing environment.

18 Dr Vincenzi also expressed the view:[8]

> Based on the measure administered, [the applicant] falls within the *very low* risk category for future offending behaviour in the long term. This is the lowest category possible on the measure. Consequently, offence-specific

[7] Emphasis added.

[8] Emphasis in original.

> treatment with the view to lower her risk is not recommended. While [the applicant's] mental health problems seem to have contributed to her offending, the events that led to her mental health problems do not appear to have affected her personality or led to ongoing behavioural problems. It is recommended that she continue to receive psychological treatment to address her mental health symptoms and ensure that she has an improved repertoire of functional coping strategies.

19 At a further hearing following the provision of Dr Vincenzi's report, counsel for the applicant submitted that 'the major depressive disorder [is] really the thrust of [the applicant's] difficulties … and Dr Vincenzi draws a link between the depressive disorder and the offending', albeit it does not go 'as far as to mitigate culpability'. Significantly, counsel said that the report did not go quite far enough to engage any *Verdins*[9] factor.

20 Later, in the course of another hearing, Dr Vincenzi gave oral evidence. I need not summarise his evidence, save to observe that he said that he 'would imagine that being in prison would exacerbate [the applicant's] depression'. Based on that evidence, counsel for the applicant submitted that the sixth *Verdins* proposition was engaged.[10]

21 The prosecution opposed any deferral of sentence. It was submitted that a CCO coupled with imprisonment was not within range, and that the judge should impose a sentence of imprisonment with a non-parole period. General deterrence was important. The prosecution submitted that the applicant had committed the offence against her employer, and there was no real explanation as to how the bulk of the funds obtained were spent.

Reasons for sentence

22 Among other things, in his reasons for sentence the judge noted that since the applicant's dismissal from Suncorp she had maintained two jobs, both to support

9 *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

10 *Verdins*, 276 [32]:

> 6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

herself and to make some restitution. The applicant had repaid a total of $25,050, which 'is a significant matter' to which 'full weight' would be given.

23 The judge accepted that the departure of the applicant's mother in 2009 'had a devastating emotional toll' upon the applicant and her siblings, leading to the applicant retreating and 'becoming more and more isolated'. Further, the judge referred to various of Dr Vincenzi's observations to which I have earlier adverted, including that the applicant's offending 'could be viewed as a dysfunctional coping strategy as an attempt to retain agency over [her] world'.[11]

24 Principles of general deterrence and denunciation, the judge said, 'are clearly the primary sentencing considerations' in the applicant's case. General deterrence, the judge observed, 'is of particular importance', since 'offending of this kind is easy to commit, may be difficult to detect and is usually committed by persons who hold a position of trust and who are otherwise of good character'. Thus, 'the message needs to be sent to anyone contemplating exploiting or abusing their employed position so as to dishonestly enrich themselves', that if they are caught they will be punished. Whilst the applicant's offending 'might not be described as sophisticated, elaborate or complex, it nonetheless required forethought, some degree of planning and on each occasion a decision by [her] to complete the fraudulent transaction'. Offending of this kind, the judge said, 'will always be viewed by the courts as serious'. It is 'not a species of victimless crime as some are apt to regard it'. The applicant's offending — which covered a period of three years and four months and involved a sum in excess of $200,000 — was 'a gross abuse of the trust' that had been placed in her by her employer.

25 Having referred to a range of factors — including the plea of guilty 'entered at the earliest opportunity'; the applicant's 'genuine remorse'; her 'full and frank admissions' to her employer and police; the delay between 'first investigation and final resolution'; the applicant's efforts made to effect restitution; her engagement in counselling; Dr Vincenzi's opinion as to the lasting impact upon the applicant of her

[11] See [16]–[20] above.

mother's abandonment; her ongoing depressive disorder; the applicant's relative youth; her 'excellent prospects of rehabilitation'; and the fact that it was the applicant's first time in custody — the sentencing judge expressed the view that 'the sentencing purposes of general deterrence and denunciation can only be met by an immediate term of imprisonment'.

Analysis

26 In this Court, counsel for the applicant in essence submitted that, having regard to the manifold 'weighty matters in mitigation' spelled out in the 19 particulars adumbrated in the ground of appeal, and the objective circumstances of the offence, the sentence imposed is manifestly excessive.

27 The respondent contended, however, that the applicant's offending was protracted, involving 25 fraudulent transactions whereby she obtained $200,099 from her employer over a period in excess of three years. It was submitted that the applicant's offending involved considerable forethought and planning and involved a gross breach of trust, and only ceased when discovered by her employer.

28 Counsel for the respondent submitted that both general deterrence and denunciation had a significant role to play in the sentencing exercise. The judge was entitled to find that these were the primary sentencing considerations in the applicant's case. Further, the judge also found that specific deterrence had a role to play, but that its significance was diminished (although not eliminated). The judge also 'gave full effect' to the matters relied upon in mitigation.

29 The respondent's counsel noted that, on the plea, the applicant's counsel 'repeatedly disavowed any reliance upon *Verdins* principles', until ultimately making a submission that 'the sixth principle in *Verdins* had some applicability'. As is demonstrated by his reasons for sentence, however, the judge 'took into account the depressive disorder suffered by the applicant in a general way'. It was not lost on the judge that a sentence imprisonment would have a negative impact upon the

applicant.

30 Counsel for the respondent submitted that, having regard to the objective seriousness of the applicant's offending, the matters personal to her and the relevant sentencing principles, 'a substantial sentence of imprisonment was called for', so much being 'demanded' by principles of general deterrence and denunciation. The reasons for sentence demonstrate that the sentencing judge 'gave careful consideration to all of the relevant sentencing considerations and principles'. In all the circumstances, counsel contended, the sentence imposed on the applicant was within the range of sentences open to the sentencing judge in the proper exercise of the sentencing discretion.

31 In my view, the respondent's submissions should be accepted.

32 As has been observed more than once, manifest excess is a conclusion which does not depend upon the attribution of identified specific error. Moreover, it is a conclusion that ordinarily does not admit of much elaboration or sustained argument,[12] since excess is, or is not, plainly apparent, and a sentence is, or is not, unreasonable or plainly unjust. The sentence may be excessive because the wrong type of sentence has been imposed, or because the sentence imposed is manifestly too long.[13] A judge of an appellate court will approach the task of assessing whether a sentence is manifestly (as opposed to simply arguably) excessive in much the same way that a sentencing judge approaches the imposition of sentence at first instance; that is, by instinctively synthesising all relevant factors in order to determine whether he or she considers the impugned sentence to be just and appropriate.[14] But it is not enough for appellate intervention to be warranted that the judges of the appellate court regard the impugned sentence as stern, or that they would not themselves have passed the same sentence. Intervention is justified only if the sentence is wholly outside the range of those open in the sound exercise of

12 *R v Kenny* (Unreported, 2 October 1978, Vic, CCA); *Noa v R* [2013] VSCA 4, [12]; *Allen v R* (2013) 36 VR 565, 573 [51]-[52].

13 *Dinsdale v The Queen* (2000) 202 CLR 321, 325–6 [6] (Gleeson CJ and Hayne J).

14 Ibid.

discretion.[15]

33 In the present case, it may be acknowledged that the applicant has excellent prospects of rehabilitation, and that she can call in aid a number of significant matters in mitigation, including her early plea of guilty; her remorse; her cooperation with her employers and police; her partial restitution; her relative youth; and many of the other matters advanced by her counsel on her behalf.

34 It cannot be ignored, however, that the applicant's offending was serious. As the judge observed, it involved a gross breach of trust. The applicant's fraudulent activity was calculated, deliberate and protracted, and involved a large sum in excess of $200,000. It was not mitigated by any mental condition, no *Verdins* propositions being attracted. Indeed, although her counsel on the plea struggled to advance an explanation for the offending, in my view there is no reason to doubt what the applicant told Dr Vincenzi:

> She reported that she spent the money on things that made life easier for her and allowed her and her brothers to be self-reliant. She also reported that she would spend the money on pampering herself, such as facials or hair stylist appointments, stating, 'it was like I wanted someone to love me, so I had to love myself'.

35 Not only were general deterrence and denunciation important, but it was also important that the sentence imposed was adequate to punish the applicant for her serious offending.

36 Balancing all relevant factors, I do not regard it to be reasonably arguable that the sentence imposed was altogether outside the range of those available to the judge

[15] *Lowndes v The Queen* (1999) 195 CLR 665, 671–672 [15].

37 in the sound exercise of the sentencing discretion.

Conclusion

38 The application for leave to appeal against sentence must be refused.

39 WEINBERG JA:

40 I agree, for the reasons given by Priest JA, that leave to appeal should be refused. The sheer scale of the applicant's fraud, which extended over a period of more than three years, and involved a significant and ongoing breach of trust, required the imposition of a custodial term. It cannot be said that the sentence imposed was wholly outside the range of sentences reasonably available to the sentencing judge.

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